



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. **78-1916**

CLARENCE TONKA,

Petitioner,

-against-

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

Clarence Tonka, Petitioner herein, prays that a writ of
certiorari issue to review the judgment of the United
States Circuit Court of Appeals for the Fifth Circuit,
entered in the above-entitled case on March 27, 1979.

OPINIONS BELOW

The Order of the United States District Court, North-
ern District of Georgia, Atlanta Division, dated March 8,
1978, which Order denied the Plaintiff's Motion for a
Jury Trial is unreported and is printed in Appendix E

hereto. The unpublished Per Curiam opinion of the United States Court of Appeals for the Fifth Circuit, dated March 27, 1979, which affirmed the Order of the United States District Court, Northern District of Georgia, Atlanta Division, dated March 8, 1978, is reported at 392 F.2d 1189 (5th Cir. 1979) and is printed in Appendix F hereto. The judgment of the United States Court of Appeals for the Fifth Circuit, dated March 27, 1979, which affirmed the Order of the United States District Court, Northern District of Georgia, Atlanta Division, dated March 8, 1978, is unreported and is printed in Appendix G hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 27, 1979 (Appendix G). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S JURY DEMAND WHEN THE DEMAND TIMELY FOLLOWED THIS COURT'S DETERMINATION THAT A RIGHT TO A JURY TRIAL EXISTED IN A PRIVATE ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., pp. 815-821 (pertinent text set forth in Appendix A hereto).

2. United States Constitution, Amendment VII—Civil Trials, p. li (pertinent text set forth in Appendix B hereto).

3. Fair Labor Standards Act, 29 U.S.C. §201 et seq., pp. 738-776 (pertinent text set forth in Appendix C hereto).

4. Rule 38, Federal Rules of Civil Procedure, 28 U.S.C. Rule 38, p. 466 (pertinent text set forth in Appendix D hereto).

STATEMENT OF THE CASE

Petitioner, Clarence Tonka, commenced this action under the Age Discrimination in Employment Act, (ADEA), 29 U.S.C. §621 et seq., on December 3, 1974 in the United States District Court, Northern District of Georgia, against his employer, Respondent American Telephone & Telegraph Company. The District Court's jurisdiction was invoked under 28 U.S.C. §1331. At the time of trial Petitioner was fifty-five years old and had been continuously employed by Respondent for over thirty years. Prior to being placed in the job position that prompted this litigation, Petitioner had worked in various areas of Respondent's business, including sales, traffic, engineering and accounting.

Respondent's personnel classification system assigns employees to various pay grades and numerical positions. Under Respondent's system, the lower the position number, the higher the job in terms of pay, prestige, and position in the organization. During the litigation, Petitioner performed the duties of a Level 9 employee but was retained at Level 12, solely because of his age.

In January, 1971, Petitioner was assigned to Respon-

dent's national account program, designed to provide special services to large users of communication services called "national accounts". Each national account is serviced by a national account support team headed by a "National Account Manager" (NAM). In July, 1972, Petitioner was assigned as the National Account Accounting Manager (NAAM) for each national account located in the southeastern United States. Petitioner's predecessor was a Level 7 employee, was thirty-nine years old at the time, and had been promoted to Level 9 at age thirty-one.

As the southeastern United States NAAM, Petitioner was responsible for solving all billing problems of the southeastern national accounts originating anywhere within the Bell System. In this position, Petitioner initially reported to a Level 5 employee and, later, a Level 7 employee. Petitioner worked with little or no supervision, and his supervisor subsequently rated Petitioner extremely high on Respondent's performance rating scale.

Respondent also employed NAAMs in other regions of the United States. During the litigation, each of these other NAAMs was a Level 9 employee, was younger than Petitioner and had been promoted to that level when each was forty years old or younger.

In December, 1973, Petitioner was assigned important responsibilities in the auditing, safety, office rearrangements, and record managements areas in addition to his NAAM responsibilities. After he assumed these new responsibilities, Petitioner's job was substantially equivalent to those of his Level 9 co-NAAMs. Furthermore, the persons who previously performed Petitioner's new responsibilities were also Level 9 employees.

In his complaint of December 3, 1974, Petitioner alleged that Respondent had discriminated against him in his employment on the basis of his age in violation of the ADEA. Petitioner did not file a demand for jury trial with his complaint, or within ten days of Respondent's answer because he reasonably believed he had no right to a jury trial in a private ADEA action under the then existing state of the law. Respondent served its responsive pleadings on December 27, 1974.

Following discovery, a pre-trial order was filed on August 25, 1977. Thereafter the case appeared twice on non-jury trial calendars, but was continued because of conflicts of counsel and witnesses. One such continuance was at the request of Petitioner and one was at the Respondent's request. On January 27, 1978, the case was placed on a non-jury trial calendar to be called March 13, 1978.

On February 22, 1978, the United States Supreme Court in *Lorillard vs. Pons*, 434 U.S. 575 (1978), announced that a private plaintiff was entitled to a jury trial under the ADEA. Within ten days thereafter Petitioner filed a demand for jury trial pursuant to Rule 38(b), Federal Rules of Civil Procedure, and, alternatively, a motion requesting the court to allow a jury trial pursuant to Rule 39(b), Federal Rules of Civil Procedure. On March 8, 1978, the District Court ruled that Petitioner's demand for jury trial was untimely and denied his motion for jury trial.

A trial of the case thereafter began on March 24, 1978. On April 14, 1978, the District Court entered an order and judgment in favor of Respondent against Petitioner. Petitioner then filed a notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit on

May 11, 1978. The court below affirmed the District Court's order in a per curiam opinion and judgment dated March 27, 1979. This Petition for a Writ of Certiorari followed.

ARGUMENT AND CITATION OF AUTHORITY

I. AT THE TIME PETITIONER COMMENCED HIS LAWSUIT AND UNTIL THIS COURT DECIDED *LORILLARD VS. PONS*, PETITIONER DID NOT HAVE A CLEARLY ESTABLISHED RIGHT TO A JURY TRIAL UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

On December 3, 1974, Petitioner instituted the present action under the Age Discrimination in Employment Act (ADEA) against his employer, American Telephone and Telegraph Company. Petitioner sought declaratory relief; injunctive relief from Respondent's discriminatory policies and practices; reclassification to a higher employment grade level; back wages in the form of salary increases and higher compensation based upon reclassification; liquidated damages; costs and attorney's fees. The Respondent served responsive pleadings on December 27, 1974.

The ADEA prohibits an employer's classification of his employees so as to deprive them of employment opportunities or to adversely affect their status on the basis of age, 29 U.S.C. §623(a)(2) (Appendix A). The Act's enforcement provision permits courts to grant legal or equitable relief where violations exist, 29 U.S.C. §626(b) (Appendix A).

The Act further grants a private right of action for legal or equitable relief from violations, 29 U.S.C. §626(c)(1)

(1967), *as amended*, 29 U.S.C. §626(c)(1) (1978) (Appendix A). Prior to 1978 the Act did not expressly afford a private litigant the right to a jury trial on factual issues raised in his pleadings. However, in February, 1978 this Court decided that under the ADEA a trial by jury is available to a private suitor, *Lorillard vs. Pons*, 434 U.S. 575 (1978). Thereafter, Congress expressly enacted this right by adding subsection (c)(2) to the original legislation, 29 U.S.C. §626(c)(2) (1978), *amending* 29 U.S.C. §626(c) (Appendix A), see Public Law 95-256, §4(c)(1), 92 Stat. 190, 191.

When Petitioner commenced his lawsuit in December 1974, this Court, the Fifth Circuit and Congress had not addressed the issue of a private litigant's right to a jury trial under the ADEA.¹ The first precedential case to address the issue was an Ohio district court case, *Chilton vs. NCR Co.*, 370 F.Supp. 660 (S.D. Ohio 1974). *Chilton* initially noted that some ADEA cases had been tried to juries but the existence of the right had not been discussed. *Chilton* evaluated the plaintiff's Seventh Amend-

¹ *Monroe vs. Penn-Dixie*, 335 F.Supp. 231 (N.D. Ga. 1971) was decided in 1971 in Petitioner's trial district. That ADEA case was procedurally before the court on the defendant's motion for JNOV, which motion failed to raise the issue sub judice. Holding that the plaintiff's job discharge preceded the effective date of the Act, the court overturned the verdict. Subsequent cases cite *Monroe* solely for its determination of the proper discharge date under the ADEA, *see, e.g., J. C. Payne vs. Crane Corporation*, 560 F.2d 198 (5th Cir. 1977).

Additionally, although *Matthews vs. Drew Chemical Corporation*, 475 F.2d 146 (5th Cir. 1973), involved a jury trial on issues of breach of contract and age discrimination, that case is not dispositive of the present issue either. Noting that a jury had heard the case, the Fifth Circuit explicitly declined to discuss the right to the same, 475 F.2d at p. 147, f.n. 1.

ment jury right (Appendix B) according to the three-pronged test announced in *Ross vs. Bernhard*, 396 U.S. 531 (1970). *Ross* characterizes claims as legal, triable to a jury, or equitable, triable to the court.²

The court then observed that the ADEA's enforcement provision, 29 U.S.C. §626(b), expressly incorporates §216 and §217 of the Fair Labor Standards Act (FLSA) for fashioning appropriate relief (Appendices A and C). The court declined to compare the ADEA to Title VII, 42 U.S.C. §2000e et seq., stating that the FLSA was a satisfactory analogue. Examining these incorporated sections, the court characterized §216 as allowing legal relief and §217 as allowing injunctive, or equitable, relief. The court then held that a jury right existed under the Act on the issue of lost wages but not on the issues of liquidated damages, costs or attorney's fees.

Post-*Chilton* cases shared one common trait: a profound divergence among circuit and district courts not only as to the existence of a jury right under the Act but also as to the rationale underlying their decisions. For example, *Brennan vs. International Harvester, Inc.*, 7 E.P.D. 9171 (N.D.Ill. 1974) struck the defendant's jury demand. Again comparing the ADEA to the FLSA, the court characterized §217 of the latter act as equitable in nature, thus barring a jury demand on a back wages claim.

It is noteworthy that *Brennan* relied on the Fifth Circuit case of *Sullivan vs. Wirtz*, 340 F.2d 901 (5th Cir.

² The *Ross* test asks: (a) whether the issue is legal or equitable under premerger custom; (b) whether the remedy sought is legal and not equitable; and (c) whether the issue is triable to a jury, given their practical abilities and limitations, 396 U.S. at page 538, f.n. 10.

1965), aff'd on reh., 359 F.2d 426, cert. den. 385 U.S. 852. *Wirtz* held that the Seventh Amendment does not apply where the Secretary of Labor sues to restrain the withholding of employee wages under §217; rather, Congress intended for the courts to exercise their equity power to restrain such violations.

Thus, the uncertainty created by *Chilton* and *Brennan* and the absence of definitive authority within the Fifth Circuit prevented Petitioner from ascertaining the existence of a constitutional or a statutory right to a jury when he filed his complaint.

ADEA cases arising after Petitioner commenced his action further obfuscated the existence of a possible jury right. *Cleverly vs. Western Electric Company*, 69 F.R.D. 348 (W.D. Mo. 1975), harbingered the jury issue in the Eighth Circuit, noting that *Chilton* was the only dispositive case on the issue to date. *Cleverly* opined that if a jury right attached to age discrimination claims at all, it flowed from the Seventh Amendment. The court applied *Ross vs. Bernhard*, supra, to hold that claims for injunctive reinstatement, attorney's fees and costs constituted equitable relief, triable to the court, whereas back pay claims resembled monetary damages under traditional contract law concepts, warranting a jury trial. However, *Cleverly* substantially departed from *Chilton* in one respect. The court allowed a jury trial on the liquidated damages claim, analogizing it to a claim for actual and punitive damages under common law.

The divergence of opinion on the jury issue was heightened by *Pons v. Lorillard*, 69 F.R.D. 576 (M.D.N.C. 1976), a case of first impression within the Fourth Circuit. *Pons* contributed to the existing quagmire by electing to compare the ADEA to Title VII rather than the FLSA. While it recognized *Chilton* as the sole case of precedential value,

Pons stated that *Chilton* was *not* dispositive of the issue, 69 F.R.D. at p. 577. The court first concluded that §626(b) and §2000e-5(g) of Title VII ameliorate correspondent evils. It then reasoned that the plaintiff's claim for lost wages under the Act was integral to the equitable remedy of job reinstatement, also sought by the plaintiff.³

Before *Pons* was ultimately reversed on appeal to the Fourth Circuit, 549 F.2d 950 (4th Cir. 1977), *aff'd*, *Lorillard vs. Pons*, 434 U.S. 575 (1978), it spawned cases elsewhere. *Platt vs. Burroughs Company*, 424 F.Supp. 1329 (E.D.Penn. 1976), introduced the jury issue to the Third Circuit. That case followed *Pons* in holding that a back pay claim under the Act was integral to injunctive relief, and thus was equitable in nature. *Platt* subsequently reversed itself in 1977 after the Third Circuit decided *Rogers vs. Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977), *cert. den.*, 434 U.S. 1022.⁴

The *Pons* district court decision also generated a like ruling upon the same reasoning in *Hannon vs. Continental National Bank*, 427 F.Supp. 215 (D.Col. 1977), a case of first impression within the Tenth Circuit. *Hannon* concluded that a back pay claim seeks restitution and, thus, is equitable in nature, whether sought alone or in conjunction with a prayer for injunctive reinstatement.

³ This viewpoint apparently conflicted with the Supreme Court's decision in *Dairy Queen, Inc. vs. Wood*, 369 U.S. 469 (1962). *Dairy Queen* held that the Seventh Amendment right to a jury remains intact even if a legal claim is joined with an equitable one. In short, the right to a jury trial cannot be abridged by characterizing the legal relief sought as incidental to the equitable claim, *Id.*

⁴ *Rogers* analogized an ADEA back wages claim to a wage claim upon the breach of an employment contract, which would allow a jury trial under the Seventh Amendment. The court also discussed the incorporation of §216 of the FLSA into the ADEA's enforcement provision.

Two months after *Pons* was decided, *Murphy vs. American Motors Sales Corporation*, 410 F.Supp. 1403 (N.D.Ga. 1976) addressed the present issue for the first time within the Fifth Circuit.⁵ In *Murphy*, the plaintiff demanded a jury trial on his ADEA claims for back pay, liquidated damages, punitive damages and injunctive reinstatement. Denying the Defendant's motion to strike the jury demand, the court held *inter alia* that punitive damages constitute legal relief, thereby entitling the plaintiff to a jury trial. However, the court observed the substantial divergence of opinion on the controlling question of law it had decided and immediately certified the case for an interlocutory appeal. Pending appeal, this Court decided *Lorillard vs. Pons*, *supra*, upon which the Fifth Circuit relied in affirming *Murphy* in part, *Murphy vs. American Motors Sales Corporation*, 570 F.2d 1226 (5th Cir. 1978), *aff'g.* in part, *rev'g.* in part 410 F.Supp. 1403 (N.D.Ga. 1976).

The *Pons* district court decision subsequently ran aground on appeal to the Fourth Circuit, *Pons vs. Lorillard*, 549 F.2d 950 (4th Cir. 1977).⁶ The circuit court opinion reasoned that the phrase "legal . . . relief" in §§626(b) and (c)(1) empowers the federal courts to grant jury trials to age discrimination complainants under the Seventh Amendment. The court then stated that the district court had erroneously compared the Act to Title VII instead of the FLSA. Citing *Ross vs. Bernhard*, *supra*, the court held that an award for back wages is a traditional common

⁵ *Murphy* was decided by the Atlanta Division of the Northern District of Georgia, which division also heard Petitioner's case.

⁶ At this point, the Sixth Circuit had already addressed the jury trial issue. *Morelock vs. NCR Corp.*, 546 F.2d 682 (6th Cir. 1976) compared the Act to the FLSA and held that a right to a jury trial did not exist on claims for reinstatement and injunctive relief. Apparently, the Court did not address the issue of a jury trial on back wages.

law remedy triable to a jury even if it is intertwined with an equitable claim, *see, Dairy Queen, Inc. vs. Wood*, supra.

Petitioner submits that the foregoing decisions offered him no guidance in discovering the existence of a right to a jury trial on his ADEA claim. Petitioner sought inter alia back pay, liquidated damages and injunctive relief. Although *Chilton* granted Petitioner a jury trial on the back wages claim, *Brennan* denied the right, relying on the Fifth Circuit's *Sullivan* case. *Cleverly* made Petitioner's liquidated damage claim triable to a jury, whereas *Chilton* submitted the claim to the court's equity jurisdiction. Furthermore, the district court opinions in *Pons*, *Platt* and *Hannon* analogized the ADEA to Title VII, rather than the FLSA analogue, thereby denying Petitioner a jury trial on his back pay claim. Before these cases were reversed on appeal, they stood as precedential authority in the Third, Fourth and Tenth Circuits that a complainant such as Petitioner was not entitled to a jury trial on joint claims of back pay and injunctive reinstatement.

Additionally, the first definitive pronouncement on the present question within Petitioner's federal judicial circuit was *Murphy*. However, that case also addressed the right to a jury trial on a punitive damage claim, which the ADEA does not recognize, as discussed on appeal, *Murphy vs. American Motor Sales Corporation*, 570 F.2d 1226 (5th Cir. 1978). Accordingly, the possibility of *Murphy*'s reversal on appeal was formidable. Moreover, *Murphy*'s great concern over the uncertain state of the law on the jury right prompted it to certify the issue for an immediate interlocutory appeal. Thus, had Petitioner demanded a jury trial in 1976, relying on *Murphy*, his authority would have been tenuous.

Therefore, based upon the numerous mutations that *Chilton* underwent among the circuit and district courts, Petitioner submits that his ADEA claims were not triable of right to a jury in the Fifth Circuit until this Court's decision in *Lorillard vs. Pons*, 434 U.S. 575 (1978).

II. BY AFFIRMING THE DISTRICT COURT'S ORDER THAT PETITIONER HAD WAIVED HIS RIGHT TO A JURY TRIAL, THE COURT OF APPEALS RENDERED AN INTERPRETATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT WHICH CONFLICTED WITH THIS COURT'S PRIOR DECISION IN *LORILLARD VS. PONS*.

Petitioner contends that the Fifth Circuit's summary affirmance of the District Court's order conflicts with this Court's interpretation of the ADEA's enforcement provision in *Pons*. The affirmance effectively deprived Petitioner of an important right which this Court vested in his favor, and the resulting conflict necessitates a granting of this Petition.

This Court held in *Pons* that Congress intended that a jury trial would be available to private litigants under the ADEA. The Court found the Act itself to be dispositive of the issue and avoided the constitutional claim under the Seventh Amendment. Furthermore, the Court discussed Congress' clear intent to enforce the ADEA in accordance with provisions of the FLSA, which grants private suitors a right to a jury trial, through Congress' selective incorporation of the FLSA into the Act. Moreover, the Court observed that reliance upon Title VII as a comparative standard for the ADEA was misplaced and thus unavailing.

This Court's *Pons* decision constituted the first clear

authority that granted Petitioner a right to a jury trial under the ADEA. The sharp divergence of other courts and the failure of the Fifth Circuit to address the issue left the Petitioner bewildered as to the legitimacy of a possible jury demand. In short, the confused state of the law gave Petitioner sufficient reason to withhold demanding a jury trial on his claims until proper clarification by this Court. The Court will remember that it granted certiorari in *Pons* "to resolve the conflict in the circuits on this important issue in the administration of the ADEA," 434 U.S. at p. 575.

In the present case, Petitioner moved for a jury trial under Rules 38 and 39 of the Federal Rules of Civil Procedure nine days after the Court decided *Pons* on February 22, 1978. Rule 38(b) permits a party to demand a trial by jury of any issue *triable of right* by jury by serving his demand not later than ten days after the service of the last pleading directed to such issue (Appendix D). Rule 38(d) states that the failure to serve a demand within this ten day period constitutes a party's waiver of a trial by jury (Appendix D).

In the District Court and on appeal to the Fifth Circuit, Respondent argued that, despite the confusion in the law on the availability of a jury trial, Petitioner nonetheless automatically waived his trial "right" by failing to demand the same at the inception of his action (Brief of Appellee on Appeal to the Fifth Circuit, pp. 9-16). The District Court adopted this viewpoint in denying Petitioner's jury demand although it admitted having trouble understanding the *Pons* decision (Order of the District Court, dated March 8, 1978; Appendix E).

Petitioner still cannot understand how he waived a right which had not previously accrued in his favor.

Indeed, several cases have held that unvested constitutional rights cannot be waived. *Curtis Publishing Company vs. Butts*, 388 U.S. 130 (1967) inquired whether a libel defendant waived a First Amendment free speech defense by failing to assert the same before judgment. Following a verdict and judgment for Butts, this Court decided that First Amendment considerations attach to libel actions involving public officials, see *New York Times Co. vs. Sullivan*, 376 U.S. 254 (1964). Curtis then unsuccessfully moved for a new trial based upon the constitutional standard established in *New York Times* and thereafter appealed to the Fifth Circuit. That court ruled that by not interposing the defense at trial, Curtis had waived any right to challenge the judgment on constitutional grounds.

This Court reversed, stating that the: "mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground," *id.* at p. 143.

The Court should also recall its response to Butt's primary contention, which is identical to the Respondent's argument in the case at bar. Butts claimed that the general state of the law during the trial was such that Curtis, in the Fifth Circuit's words, "should have seen the handwriting on the wall" and invoked a constitutional defense, *id.* This Court replied "we cannot accept this contention," *id.* at p. 144.

Butts also argued that Curtis' attorney should have realized the importance of the pending *New York Times* appeal to his own case. This Court responded that even an attorney who was fully cognizant of the record in *New York Times* might have reasonably expected the case to

have had no impact on current litigation, *id.*

Ultimately, the Court's final words on the waiver issue are germane to the case at bar:

"We would not hold that Curtis waived a 'known right' before it was aware of the *New York Times* decision. *It is agreed that Curtis' presentation of the constitutional issue after our decision in New York Times was prompt* (emphasis added) *id.* at p. 145.

A like result under the Fourth Amendment occurred in *Walker vs. Peppersack*, 316 F.2d 119 (4th Cir. 1963). At that time, Maryland law, unfettered by federal law, allowed the admission at trial of illegally seized evidence. Accordingly, the defendant elected not to raise a Fourth Amendment challenge to the warrantless search of his apartment. After this Court prohibited the admission of fruits of an unlawful search, *see, Mapp vs. Ohio*, 367 U.S. 643 (1961), the defendant claimed a deprivation of his constitutional rights. *Walker* ruled that:

"Contemplating both federal and state law, it would have been plain to any lawyer that raising, either at trial or on appeal, a question of the admissibility of this evidence might well have been characterized as frivolous—certainly futile as a practical matter, *id.* at p. 125.

Similarly, the Fifth Circuit has ruled a waiver does not result when it would be useless to raise the existence of a constitutional right before the Supreme Court establishes it, *Shoffeitt vs. United States of America*, 403 F.2d 991 (5th Cir. 1968), cert. den. 393 U.S. 1084. *See also, United States of America vs. Rosenson*, 291 F.Supp. 874 (E.D.La. 1968), cert. den. 397 U.S. 962, reh. den. 397 U.S. 1058, holding that a client and his attorney are not required to anticipate Supreme Court rulings that overturn existing

cases which bar a self-incrimination defense.

The foregoing cases readily indicate that the Petitioner did not waive any amorphous right to a jury trial yet to be established by this Court or his federal judicial circuit. Furthermore, Petitioner's trial counsel should not be faulted for reasonably awaiting this Court's resolution of a split among the circuits and thereafter immediately asserting his client's right. It is noteworthy that upon the accrual of his right, Petitioner demanded a jury trial within the ten-day prescription of Rule 38(b) (Appendix D). This Court recognized similar conduct as negating a waiver of constitutional rights in *Bulls*, 388 U.S. at p. 145.

Petitioner also submits that his jury demand on the eve of trial can be likened to an amended complaint. Rule 38(b) allows the filing of a jury demand within ten days of the service of certain amended pleadings, *see, Guajardo vs. Estelle*, 580 F.2d 748 (5th Cir. 1978); *Jackson vs. Airways Parking Company*, 297 F.Supp. 1366 (N.D.Ga. 1969). For example, *Swofford vs. B & W, Inc.*, 34 F.R.D. 15 (S.D.Tex. 1963), aff'd. 336 F.2d 406 (5th Cir. 1964), cert. den. 379 U.S. 962, allowed a jury demand eight months after the complaint, where the amended pleadings added new plaintiffs without changing the initial cause of action. The court deemed the amendment to be the "last pleading" within the context of Rule 38(b) (Appendix D). Notably, the addition of the new plaintiffs did not raise new issues of fact, which *Guajardo* viewed as a prerequisite for allowing a late jury demand.

Support for Petitioner's contention is also found in *In re Zweibon*, 565 F.2d 742 (D.C. Cir. 1977). There, the court held that Rule 38(b)'s ten-day rule ran from the date the court returned its mandate to the district court

to hear evidence upon a possible "good faith" affirmative defense, not previously raised.

In summary, on the basis of the above cases, Petitioner maintains that the District Court and the Fifth Circuit should have accepted his jury demand within the ambit of Rule 38(b). Because Petitioner timely filed a jury demand upon the accrual of his right to the same, the Fifth Circuit's affirmance of the District Court's order conflicted with this Court's interpretation of the ADEA.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY R. BAUER, JR.

THOMAS E. RAINES

GERALD B. KLINE
Counsel for Petitioner

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CERTIFICATE OF SERVICE

This is to certify that as a member of the bar of the Supreme Court of the United States, I have this day served counsel for Respondent in the foregoing matter with a copy of this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon to:

Messrs. Duane C. Aldrich and
Joseph W. Dorn
Kilpatrick, Cody, Rogers, McClatchey & Regenstein
3100 The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303

This _____ day of _____, 1979.

HENRY R. BAUER, JR.
Counsel for Petitioner

1500 Peachtree Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 588-1500

APPENDICES

APPENDIX A

Age Discrimination In Employment Act

§ 623. Prohibition of age discrimination

Employer practices

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appro-

priate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

APPENDIX B

United States Constitution, Amendments

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX C

Fair Labor Standards Act

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection

to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

• **§ 217. Injunction proceedings**

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

APPENDIX D

Federal Rules Of Civil Procedure

Rule 38. Jury Trial of Right

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

APPENDIX E

District Court Order of March 8, 1978

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLARENCE TONKA

vs.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY

} CIVIL ACTION
NO. 74-2336A

ORDER

On March 2, 1978, plaintiff in the above-stated action filed his demand for jury trial within ten days of the decision of the United States Supreme Court in the case of *Pons v. Lorillard*, 46 U.S.L.W. 4150 (February 22, 1978). He accompanied said demand for jury trial with brief in support thereof, all filed on March 2, 1978. On March 6, 1978, the defendant filed its brief in opposition to plaintiff's motion for jury trial, and on March 7, 1978, the plaintiff filed his reply brief to the defendant's brief in opposition to the motion.

The sum and substance of plaintiff's jury demand, filed some three years and three months after his complaint was docketed, is that the effect of the Supreme Court decision in *Pons* is to create for him a new right which he did not have previously. Thus, contends plaintiff, his demand is timely filed within the federal rules, and because there was no clear pronouncement on the subject until *Pons* there was no known right to jury trial which he could have waived.

Defendant, on the other hand, contends in essence that the situation here confronting the court and the parties is not a newly created right, but one that has been there all along and that was pronounced by another judge of this district in the Spring of 1976. See *Murphy v. American Motor Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976). But see *Williams v. General Motors Corp.*, C75-1024A (N.D. Ga. April 25, 1977) (Henderson, J.), wherein a second judge in this district in 1977 determined that there was no right to jury trial under ADEA. Defendant argues that the plaintiff had a continuing duty to make timely demand for jury trial, or, at the latest, to have done so after *Murphy* was decided in this district. He did not, and thus, says the defendant, the plaintiff has waived his right to a jury trial.

Even though this court has some difficulty understanding the reasoning in *Pons*, the right to jury trial is now clearly established under the statute, but that pronouncement, as defendant contends, does not create a new right that plaintiff never had previously. It simply puts to final rest the split among the circuits and, in some districts, the split among judges. Waiting over three years after filing the complaint before demanding a jury trial, especially in the light of a number of district and circuit court decisions proclaiming that such right does exist in favor of private litigants in ADEA actions, when added to the obvious inconvenience to the defendant and to this court in rescheduling the case already set for non-jury calendar to a jury trial cannot be allowed in the absence of some strong showing by plaintiff that the failure to grant his demand for jury trial will prejudice him in some way. The case has the potential of being complicated and complex, memories fade, and the inconvenience of

recalling witnesses for a trial at some unknown subsequent date is reason enough to exercise discretion in denying plaintiff's demand and motion.

Accordingly, having considered carefully the motion and briefs in support and opposition thereto, plaintiff's motion for jury trial is hereby DENIED.

IT IS SO ORDERED.

This, the 8 day of March, 1978.

s/ RICHARD C. FREEMAN

RICHARD C. FREEMAN
United States District Judge

APPENDIX F

Court of Appeals Opinion of March 27, 1979

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**No. 78-2204
Summary Calendar***

CLARENCE TONKA,
Plaintiff-Appellant,

versus

**AMERICAN TELEPHONE &
TELEGRAPH COMPANY,**
Defendant-Appellee.

**Appeal from the United States District Court for the
Northern District of Georgia**

(MARCH 27, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

On this appeal from a take-nothing judgment in his Age Discrimination in Employment Act claim, appellant presents as his sole ground for reversal the denial of his demand for a jury trial. We agree with the denial for the reasons stated in the district court's order of March 8, 1978.

AFFIRMED.

* Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Cas. Co of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

APPENDIX G

Court of Appeals Judgment of March 27, 1979

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-2204
Summary Calendar

D. C. Docket No. CA-74-2336

CLARENCE TONKA,

Plaintiff-Appellant,

versus

AMERICAN TELEPHONE &
TELEGRAPH COMPANY,

Defendant-Appellee.

**Appeal from the United States District Court for the
Northern District of Georgia**

Before CLARK, GEE and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

2g

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 27, 1979

ISSUED AS MANDATE: APR 18 1979